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### Book Review

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## BOOK REVIEW

RIGHTS, FREEDOMS AND THE COURTS: A PRACTICAL ANALYSIS OF THE *CONSTITUTION ACT, 1982*. By Morris Manning, Q.C. Toronto: Emond-Montgomery, Ltd. 1983. Pp. iii, 760. \$75.00.

*Reviewed by Francis X. Beytagh, Jr.\**

There is no other country with which the United States has closer social, economic, and political ties than Canada. It is thus a matter of considerable significance when such a friendly neighbor takes the momentous step of adopting a new constitution. Canada did so in 1982, when the British Parliament (at the request of the Canadian government) enacted the Canada Act, which served to put the Constitution Act, 1982, into effect. One of the most important parts of the Constitution Act, 1982, is the Canadian Charter of Rights and Freedoms, which is the specific subject of Morris Manning's recently published text.<sup>1</sup> While written especially for Canadian practitioners and judges, the Manning book should be of no little interest to American legal scholars, for it is one of the first comprehensive efforts toward analyzing the civil liberties provisions of the new document.<sup>2</sup>

Manning articulates in the Preface his principal objectives in writing the book: "The introduction of the *Canadian Charter of Rights and Freedoms* . . . calls for a critical and detailed study of its provisions and of the principles of constitutional law which will have to be developed by the courts in applying those provisions to the cases that come before them" (p. vii). Manning seeks to address a judicial audience, for he states that the new constitutional provisions were "designed to change the role of the judiciary and their perception of fundamental rights." He stresses that courts can no longer "hide be-

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\* Visiting Professor of Law, University of Michigan (1983-84), and Cullen Professor of Law, University of Houston; Coauthor, P. KAUPER & F. BEYTAGH, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (5th ed. 1980).

1 M. MANNING, *RIGHTS, FREEDOMS AND THE COURTS: A PRACTICAL ANALYSIS OF THE CONSTITUTION ACT, 1982* (1983).

2 See *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY* (Tarnopolsky & Beaudoin eds. 1982), which includes a very useful bibliography. See also *Symposium, The New Canadian Constitution*, 32 AM. J. COMP. L. 221 (1984); *Symposium, The New Constitution and The Charter of Rights: Fundamental Issues & Strategies*, 4 S.C.L.R. *passim* (Belobaba & Gertner eds. 1982) [hereinafter cited as *Symposium, The New Constitution*].

hind the concept of legislative supremacy" and that "the entrenchment of fundamental rights does call for a different approach" by the courts in dealing with what now are "constitutionally imbedded principles" (p. vii). His short-term skepticism about the judiciary's effective use of its newly created authority to definitively interpret the provisions of the Canadian Constitution gives way to a long-run optimism that this will occur.

The judiciary is not, however, Manning's only intended target: "The existence of the Charter also calls for a text which will guide and assist the busy practitioner in the analysis to be made of its provisions in order that the practitioner may know when to raise a Charter argument, and, if so, how such an argument may best be presented" (p. vii). From his perspective as an experienced litigator, Manning writes that "a text was needed which not only examined the provisions of the new Charter but which also dealt with the underlying philosophy of a fundamental rights case in a constitutional context" (p. vii). In the absence of such analysis, Manning warns, the judiciary and the bar might narrowly interpret the statutory Bill of Rights which had been in effect prior to adoption of the new Charter.

As these extensive quotations from the book's Preface indicate, the author's approach is in no small measure shaped by his personal perception that the Charter of Rights and Freedoms needs a persuasive job of marketing as much as a detached and objective analysis. Thus, a short initial chapter discusses the historical background of the new Charter and in particular the concept of "judicial review" as developed in the American and other constitutional systems. Canada now has a system of government limited by a written Constitution with its judiciary responsible for the pronouncements concerning the nature and extent of Canadian civil rights. This "entrenchment of fundamental constitutional rights and freedoms," Manning notes, is as radical "a departure from British constitutional tradition as [was] the coming into force of the American Constitution." (p. 3). But, he adds, "[t]he model . . . chosen [by Canada] does not go so far as that in the United States and appears to be a compromise between the doctrine of Parliamentary sovereignty on the one hand and judicial supremacy on the other" (p. 4). While Canadian courts are empowered to declare a law unconstitutional pursuant to section 52 of the Constitution, the Canadian Parliament or provincial legislatures have the authority to supersede certain judicial decisions through resort to an "override" provision contained in section 33.

Manning also discusses some of the sources from which various substantive provisions of the new Charter are derived, which include several international conventions and the constitutions of Nigeria and India as well as that of the United States. He stresses that a comparative approach to analyzing the various constitutional protections is necessary to avoid what he terms the "disastrous" experience under the statutory Bill of Rights, because of "the confined interpretation given this piece of litigation" (p. 12). As to form, he laments that "the Charter is drafted in legalistic fashion and as one academic recently put it, while the American Bill of Rights reads like a beautifully written poem, the Canadian Charter of Rights and Freedoms reads like a badly drafted statute" (p. 18).

Manning provides an extensive discussion of the central role of the judiciary which, by invalidating conflicting legislation, plays a central role in effectuating the provisions of the Charter. The treatment may strike an American accustomed to the pivotal role of courts in our constitutional scheme as labored and repetitive. Manning apparently feels that it is essential to make one of the primary points of his text indisputably clear. "The new Constitution places the judiciary in a new role," he emphasizes, and "judges . . . fearful of becoming like the United States judiciary and of being cast in the role of lawmaker . . . [operate under] a misconception [about] American [constitutional] law created, in large part, by the media" (p. 24). Judge-made law is a hallmark of the common-law system, he adds, just as judicial review of governmental action is part of "a system of checks and balances so essential to democracy" under a written constitution (p. 25). Manning elaborates on what he terms "judicial supremacy and creativity," and concludes that parliamentary supremacy no longer applies in Canada as it once did. In light of the "override" provision in section 33 and the possibility of constitutional amendments, the judiciary "can never be said to be immune to popular control and its decisions unanswerable to the people of the country" (p. 37). He expands further on the "judiciary's new role . . . as guardians of the Constitution," specifically discussing the constitutional provisions relating to judicial review (pp. 38-66).

After dealing briefly with rules of interpretation and construction, Manning covers, in a somewhat incomplete fashion, the limitations on judicial review. He discusses the procedural aspects of reviewing Charter issues, as well as self-restraint notions involving the necessity for a real controversy, the avoidance of constitutional issues, and the concept of standing. He also addresses the matter of

timeliness along with the notion of justiciability. These are complex and difficult matters on which the courts themselves do not always speak clearly or consistently. Manning occasionally seems to misunderstand or at least misuse American decisions or constitutional doctrines, and a few of the American cases are misspelled or miscited. Manning also is ambivalent on the important question of the application of the new Charter protections to private as well as governmental action. He does not appear wholly aware of the possible consequences of not restricting certain guarantees to "state action," as the concept is called in American constitutional jurisprudence. And, for reasons that are less than clear, he next considers whether and how rights under the new Charter might be waived.

Manning then focuses on what he calls the "reasonable limits to constitutional guarantees" under section 1 of the Charter. Apparently, this subject is taken up prior to discussing the rights themselves because of the general caveat contained in section 1, which provides that the rights and freedoms guaranteed by the Chapter are "subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This is indeed a somewhat curious qualification of all of the Charter's provisions, and Manning strives mightily to make sense out of it in a way that avoids eviscerating the substantive protections contained in succeeding sections. He notes that the European Convention on Human Rights contains a similar clause, and argues that the provision should be given a restrictive reading based largely on the notion of reasonableness. He attempts to construe each of the operative phrases in section 1 in as sensible a fashion as possible, but confuses the matter by suggesting that the term "reasonable limits" should be analogized to the "substantive due process" concept as developed in American constitutional law (pp. 155-59). That concept has had such a checkered history that most American jurists shy away from it, except to the extent that it retains some vitality in the context of unspecified fundamental rights. Manning recognizes the cyclical saga of substantive due process in this country, but nonetheless suggests that its modern-day employment as the basis for certain unenumerated rights bears a resemblance to the intended role of section 1 as a general limitation of constitutional protections spelled out in the new Charter. To his credit, Manning begins the practice of discussing recent Canadian cases bearing on the question, an approach he follows in several chapters. Such analysis will undoubtedly prove valuable to judges, lawyers, and scholars seeking to follow developments in Canadian

constitutional law, and may suggest the wisdom of the author's periodical publication of supplemental materials which would serve to update these summaries of recent Canadian case law.

The doctrines of "vagueness" and "overbreadth" are discussed, again presumably because, like section 1, they possess a generality which potentially affects a number of the new Charter's substantive provisions. Manning argues for extensive reliance on American case law in these respects, but takes what seems to be a gratuitous (but gentle) slap at the U.S. Constitution:

While our attitude in [Canada] to American jurisprudence is formed, to a large degree, from the media coverage of American [legal developments], when one examines the cases in their proper jurisprudential setting, the decisions represent an attempt by the Supreme Court of the United States to do nothing more than read into their outdated Bill of Rights modern-day concepts of what is now found in the [new Canadian] Charter.

(p. 171). So much, one might say, for the notion of a "living constitution." Wait, an American could add, until yours gets old; let's see if it is flexible enough to last 200 years.

By far the longest chapter of the book is Chapter 7, which comprises over one-third of the text. In this chapter, Manning deals specifically (one might add, finally) with many of the substantive rights and freedoms guaranteed by the new Charter. He first gives an overview of the "fundamental freedoms" specified in section 2, which include freedom of expression, of religion, of conscience, and of association and assembly. Manning discusses the scope of this key provision, noting that the rights enunciated cover "everyone," whether citizens or not and whether human or legal persons. He does not attempt to deal comprehensively with the several freedoms protected by section 2, but suggests some of the more important questions that might arise as to each. Again, he relies heavily on American constitutional cases, and includes a helpful discussion of recent Canadian cases at the end of the discussion of each section considered in Chapter 7.

Manning addresses the so-called "mobility rights" as protected by section 6 of the Charter, having omitted the intervening sections relating to voting and to the Canadian Parliament. He notes at the outset that mobility rights—unlike fundamental freedoms, legal rights (protected by sections 7 through 14), and equality rights (protected by section 15)—are outside the ambit of section 33's "override" provision and thus "require constitutional amendment before change may be effected" after judicial interpretation (p. 221). Mo-

bility rights essentially involve aspects of the right to travel, and thus the discussion is focused and relatively succinct.

The same cannot be said for the subsequent discussion of so-called "legal rights" as protected by sections 7 through 14 of the Charter. Section 7 itself is analogous to the due process clauses of the American Constitution in providing as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Manning states that this provision "is the broadest of the legal rights embracing specific, abstract and general concepts," and was not intended "merely as a residuary clause" (p. 228). Rather, "certain new rights" flow from its language, he indicates, the definition of which is largely left up to the judiciary in the context of litigated cases. He discusses, *seriatim*, the notions of "life," "liberty," and "security of the person," hinting at possible applications of each and mentioning that "[t]he right of privacy, if protected anywhere in the Charter, is protected under the phrase 'security of the person' in section 7" (together with section 8's proscription of unreasonable searches and seizures) (p. 252). Manning then turns to the intriguing limiting clause of section 7, which speaks of "the principles of fundamental justice." This phrase, he states, is intended to have both procedural and substantive implications and provides further support "for the concept of judicial review of the reasonableness of legislation [by courts] and [thus] adopts the American rather than English model" (p. 259). Due process may serve as a starting point in determining the meaning of "principles of fundamental justice," he asserts, but the underlying idea is a somewhat different and more expansive one. Manning proceeds to explore, in some of the most interesting discussion in the book, the possible content of this sweeping constitutional concept. In referring to recent Canadian cases, the author states "[i]t is not unfair to suggest that only the passage of a considerable period of time will give rise to the resolution of the many difficult issues raised by section 7" (p. 271).

The search and seizure provisions of the Canadian Constitution are contained in section 8 of the Charter. Manning notes that the rights sought to be protected are comparable to those guaranteed by the fourth amendment to the American Constitution, although the "deliberate omission of all of the limiting phrases" may suggest a broader protection (p. 276). He explores the potential reach and possible meaning of the provision through an extensive and detailed discussion of numerous cases, most of them of American pedigree.

Persons with a specific interest in criminal procedure, whether Canadian or American, would benefit measurably from exposure to Manning's careful canvass of the pertinent case law. And, again, a survey of recent Canadian cases is included at the end of the discussion. Manning also discusses in some detail the protection afforded by section 9 against arbitrary detention, the rights of persons arrested as delineated by section 10, and the rights of those charged with a criminal offense, dealt with in section 11. This discussion is thorough and thoughtful, and provides a veritable primer for lawyers and others concerned about these matters. Similarly, the remaining parts of Chapter 7 deal with section 12's prohibition of cruel and unusual treatment or punishment (including discussion of the death penalty under Canadian constitutional law), section 13's proscription on self-incrimination, and section 14's provision of a right to an interpreter when proceedings are conducted in a language other than that comprehended by an accused.

After setting out the rights guaranteed by the Charter, Manning examines the enforcement of those rights, elaborating on how one applies for and obtains remedies. He discusses different types of actions which might be filed, who may sue under what claim, and what freedoms and rights can be enforced in the Canadian courts. Section 24 and 52 are discussed extensively; while they are mutually exclusive, Manning maintains that each may be utilized in seeking vindication of constitutional guarantees. He spends some time defining what is meant by the phrase "court of competent jurisdiction," and also deals with what forms of relief a court might order. Also, he discusses section 24(2)'s provision for the exclusion of improperly obtained evidence.

The final chapter of the book is a discursive and intriguing analysis of the application of the new Canadian Constitution to selected areas of the law. The first of these areas involves the Income Tax Act. Manning suggests that certain provisions of that statute might be questioned constitutionally under the rights guaranteed by the new Charter. Next, he treats psychiatry and the law. Here he explores limitations that might be derived from the new Charter on the way the legal system deals, both in the criminal and the civil commitment contexts, with mentally ill or deficient persons. Finally he discusses what he calls "morality and the criminal law." Actually, the focus is narrower than the title suggests, as Manning explores the extent to which expression that might be regarded as obscene or otherwise lacking in value can be repressed in a manner consistent



with the protections of the new Charter. American decisions relating to the reach and impact of the first amendment are considered at length. Ultimately, the author suggests that the Canadian approach under its new charter should more closely parallel the American cases than the more restrictive attitude reflected in British statutes and decisions.

Overall, the Manning text provides the reader with a thoughtful introduction to some of the more important provisions contained in the new Canadian Charter of Rights and Freedoms. It is thoroughly researched and competently written, though not well organized. Manning spends an inordinate amount of time and space leading up to discussion of the substantive provisions of the new Charter, and then discusses them unevenly and in one lengthy and somewhat indigestible chapter. This detracts from the work's effectiveness and, perhaps, its utility to the very persons—judges and practitioners—he is most interested in reaching.

Another failing, albeit an understandable one, relates to the text's incompleteness in certain important respects. For example, the book contains no discussion whatever of section 15 of the Canadian Charter. That section deals with so-called "equality rights" and seems unique in certain respects among the equal protection provisions commonly found in many modern constitutions. The section not only provides for equality under the law but also specifies certain bases of discrimination which are impermissible—namely, "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Also, section 15(2) contains an express authorization for a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged" on one of the grounds specified in the earlier part of the section. Surely this unusual affirmative action provision warrants the attention and consideration of the judiciary and bar in Canada, as well as those interested in comparative constitutional law; it is one of the most significant provisions of the new Charter.

Nor does Manning deal at all with issues relating to federalism, notwithstanding that Canada has a federal system with governmental authority allocated in part to the national government in Ottawa and in part to the several provincial governments. It may well be that since the provisions of the new Charter apply equally to acts of the Canadian Parliament or of a provincial legislature, such a discussion was thought to be superfluous. Yet, those who closely follow American constitutional developments realize that the federal char-

acter of our system (with, for example, dual court systems) has important implications concerning the scope and effect of constitutional protections of individuals. Some mention of potential problem areas and, perhaps, suggested solutions seems warranted.<sup>3</sup>

These criticisms aside, Manning's book is a valuable contribution to what predictably will be a growing body of literature about the provisions of Canada's new constitution. It may not be the last word, so to speak, but it plainly represents a good start.

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3 For example, section 52 contains a supremacy clause not dissimilar to that in article VI of the U.S. Constitution. It provides, in section 52(1), as follows: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." And section 32 states that the Charter "applies . . . to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." Yet various references are made throughout the document to the constitutions and legislatures of the several Canadian provinces. For example, section 45 provides that, "[s]ubject to section 41 [which relates to certain constitutional amendments], the legislature of each province may exclusively make laws amending the constitution of [that] province." And section 33 states that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." (Emphasis added). Thus, it would appear that a provincial legislature could effectively countermand the operation of the Charter's provisions relating to "fundamental freedoms" in section 2 and "legal rights" in sections 7-14 and "equality rights" in section 15 by enacting legislation to that effect. Conversely, the provincial constitutions can presumably provide *greater* protections for individual rights than that accorded by the national constitutions. And, it would appear, provincial courts are "of competent jurisdiction" within the meaning of section 24 to construe and apply provisions of the Charter, subject to review by the Supreme Court of Canada. In this regard, section 26, which is analogous to the 9th amendment to the U.S. Constitution, reads as follows: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

Thus, the potential exists for inconsistency and a resulting lack of uniformity among the several provinces with respect to the scope and application on various of the new Charter's provisions. This is not necessarily undesirable and was perhaps intended by those drafting the Constitution Act, 1982. But in light of the checkered experience in the United States in applying Bill of Rights' provisions to the states and in determining the appropriate relationship between federal and state courts, the implications on Canadian federalism (roughly paralleling those in this country) for the constitutional protection of individual rights should at least be explored and assessed. See, in this regard, the discussion contained in the Canadian Charter of Rights and Freedoms: Commentary, *supra* note 2, at 2-3, 5-6, stating that section 26 "makes clear that the Charter is not to be regarded as impliedly repealing the [statutory] Canadian Bill of Rights or provincial bills of rights [referring to those of Alberta, Quebec, and Saskatchewan] or other constitutional or statutory provisions [referring to "provincial human rights codes" in Alberta, Manitoba, Newfoundland, and Saskatchewan] protecting 'other rights or freedoms.'" *Id.* at 2-3; see also *Symposium, The New Constitution*, *supra* note 2, at 7-21.